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J. WILLIAM YEATES

MARY U. AKENS
KEITH G. WAGNER

December 13, 2002

Arthur Baggett, Jr., Chairman
State Water Resources Control Board
1001 T Street, 22nd Floor
Sacramento, CA 95814

Re: IID/SDCWA hearings – Incorporation of comments on draft CDFG findings

Dear Chairman Baggett:

On behalf of National Audubon Society, Inc., we have received and reviewed SDCWA's assertion that the proposed IID/SDCWA transfer petition remains alive. We must reiterate that IID has formally *rejected* the proposed transfer.

In its letter, SDCWA partially rests its assertions for proceeding on the Department of Fish and Game's proposed SB 482 findings. For the record, these "findings" have only been circulated in draft form for public comment. In response to SDCWA's assertions, we hereby attach and incorporate by reference our comments to the Department explaining 1) that CDFG has no statutory authority to issue any findings under SB 482 in the aftermath of IID's rejection of the transfer project, and 2) that even if the Department did have authority to issue such findings, the findings, as proposed, are arbitrary and unsupported by substantial evidence.

In any event, SDCWA – which has no water rights of its own – cannot rationally, unilaterally assert that the petition remains alive, where the holder of the water right to be transferred, the IID Board, has formally rejected the transfer. Following the IID Board's rejection, the Board fundamentally lacks jurisdiction to sustain Order 2002-13. The emperor wears no clothes: IID has no proposal before the Board to change its "point of diversion, place of use, or purpose of use" under Water Code section 1735. Order 2002-13 must be set aside to avoid a completely unnecessary confrontation over the Board's approval as a "responsible agency" of a project that has already been rejected by the "lead agency."

Sincerely,

[original signed]

Keith Wagner

cc: attached service list

attachment: Law Office of J. William Yeates, letter re: Comments - Findings Pursuant to SB 482/Fish and Game Code section 2081.7, subd. (c) to CDFG (Dec. 13, 2002).

CERTIFICATE OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 8002 California Avenue, Fair Oaks, CA 95628.

On December 13, 2002, I served the following documents on all parties listed on the attached service list by method indicated.

LETTER RE: IID/SDCWA HEARINGS – INCORPORATION OF COMMENTS ON DRAFT CDFG FINDINGS AND ATTACHED LETTER TO CDFG RE: COMMENTS – FINDINGS PURSUANT TO SB 482/FISH AND GAME CODE SECTION 2081.7, SUBD. (C).

Executed on December 13, 2002, at Fair Oaks, California.

Keith G. Wagner
Type or print name

[original signed]
Signature

**LIST OF PARTIES TO EXCHANGE INFORMATION
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WATER TRANSFER HEARING**

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J. WILLIAM YEATES

MARY U. AKENS
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December 13, 2002

Mr. Curt Taucher
Regional Manager
California Department of Fish & Game
Eastern Sierra - Inland Deserts Region
330 Golden Shore, Suite #210
Long Beach, CA 90802

Re: Comments - Findings Pursuant to SB 482/Fish and Game Code section 2081.7, subd. (c).

Dear Mr. Taucher:

On behalf of our client, National Audubon Society, Inc., we have reviewed the Department of Fish and Game's (CDFG or "Department") proposed findings regarding the effects that the QSA may have on restoration of the Salton Sea. While we do appreciate the Department's efforts to promptly comply with the requirements of SB 482, as codified at Fish and Game Code section 2081.7, subdivision (c), the Department 1) presently lacks legal authority to make such findings, and 2) does not have adequate, reliable evidence upon which such findings might be made. As a result, we strongly recommend that the Department decline making any findings on this matter.

DISCUSSION

I. STATUTORY BACKGROUND -- SB 482 AND THE SALTON SEA RECLAMATION ACT OF 1998

As noted in the Department's draft findings, in passing SB 482 the Legislature added section 2081.7, subdivision (c), to the Fish & Game Code, which states the Department may issue take permits for fully protected species at the Salton Sea as if they were listed under the California Endangered Species Act upon the fulfillment of several conditions, including the following:

After consultation with the Department of Water Resources and an opportunity for public review and comment, the department determines, based on the best available science, that the implementation of the Quantification Settlement Agreement during the first 15 years that the agreement is in effect (1) will not result in a material increase in projected salinity levels at the Salton Sea, and (2)

the agreement will not foreclose alternatives for reclamation of the Salton Sea as summarized in Section 1010(b)(1)(A) of the Salton Sea Reclamation Act of 1998 (P.L. 105-372).

As noted in the Department's draft findings, the above-cited portion of the Salton Sea Reclamation Act provides:

The Secretary shall complete all studies, including, but not limited to environmental and other reviews, of the feasibility and benefit-cost of various options that permit the continued use of the Salton Sea as a reservoir for irrigation drainage and: (i) reduce and stabilize the overall salinity of the Salton Sea; (ii) stabilize the surface elevation of the Salton Sea; (iii) reclaim, in the long term, healthy fish and wildlife resources and their habitats; and (iv) enhance the potential for recreational uses and economic development of the Salton Sea.

Finally, section 1, subdivision (a), of SB 482 specifically defines the "Quantification Settlement Agreement" (QSA) to mean –

the agreement . . . described in the draft Quantification Settlement Agreement, dated December 12, 2000, . . . and that *shall include as a necessary component* the implementation of the Agreement for Transfer of Conserved Water by and between the Imperial Irrigation District and the San Diego County Water Authority, dated April 29, 1998 (IID/SDCWA Transfer Agreement) . . . (emphasis added.)

II. SB 482 HAS BEEN RENDERED MOOT BY IID'S REJECTION OF THE IID/SDWCWA TRANSFER AGREEMENT

On December 9, 2002, the Imperial Irrigation District (IID) Board voted 3-2 against the proposed IID/SDCWA Transfer Agreement. As explained above, SB 482 expressly defines the QSA as including "as a necessary component" the implementation of the IID/SDCWA Transfer Agreement. Following IID's action on December 9, 2002, the "Quantification Settlement Agreement" contemplated by SB 482 *no longer exists*.

Put plainly, CDFG cannot lawfully issue any findings under SB 482. SB 482's existence and operation hinges on the existence of a QSA that *must* incorporate, as a necessary component, the IID/SDCWA Transfer Agreement of 1998. IID rejection of that Agreement fundamentally precludes the existence of the QSA defined in SB 482, and therefore the operation of any part of SB 482 involving the QSA – including the Department's statutory authority to render findings regarding impacts on restoration of the Sea.

Beyond this fundamental lack of legislative authority, the Department's proposed findings are arbitrary because they rely on numerous, erroneous assumptions, as further set forth below.

III. THE SALTON SEA ACCOUNTING MODEL'S OUTPUT DATA IS IN ERROR, BECAUSE THE MODEL'S UNDERLYING ASSUMPTIONS ARE INACCURATE

In projecting the Salton Sea's salinity, the Department's draft findings expressly rely on and utilize the Salton Sea Accounting Model, a predictive database that was used by Imperial Irrigation District (IID) and the Bureau of Reclamation in the EIR/EIS for the IID/SDCWA Transfer Agreement.¹ The Model, however, inappropriately includes numerous unsupported assumptions about future inflows to the Sea that skew the projection of the Sea's condition toward a more saline and degraded state.

Just one egregious example of the Model's fundamental flaws is the inappropriate inclusion in the Model's "baseline" of a predicted, annual reduction of inflow of 56,856 acre-feet/year from IID due to implementation of Inadvertent Overrun and Payback Policy ("IOP").² However – as pointed out in Audubon and others' comments on the DEIR, and in their legal briefs before the Water Board – there is no indication that this reduction will in fact occur in any given year, let alone in *every* year for the next 75-years, as erroneously claimed by the Model:

[T]he "evidence" in the record regarding the project's environmental impacts is wishful speculation wrapped in the shroud of a computer model to give the appearance of scientific validity. IID's fatalistic predictions that may never come to be are not a reasonable (or lawful) basis for the Water Transfer EIR/EIS' repeated declarations that the proposed transfer will have less than significant impacts on the *existing* Hydrology and Water Quality or on the Biological Resources of the Salton Sea. In turn, it would likewise be arbitrary for the Water Board to rely on such "evidence" in making any determination about whether the water transfer would unreasonably impact fish, wildlife and other beneficial instream uses at the Salton Sea.³

Over a fifteen-year period, this single example of the Model's inappropriate assumptions regarding entitlement enforcement under the IOP leads to the fictional "loss" of almost 853,000 acre-feet in total inflows to the Sea – an amount which would appear to be quite significant where this phantom "loss" almost matches the QSA's scheduled out-of-basin transfer of 1,000,000 acre-feet over the same time period.⁴

¹ Findings of the Department of Fish and Game With Respect to Implementation of the Quantification Settlement Agreement and the Salton Sea Made Pursuant to Section 2081.79c) of the Fish and Game Code (Draft dated Nov. 27, 2002) (hereinafter "Findings"), at p. 1.

² Imperial Irrigation District Water Conservation and Transfer Project Draft Habitat Conservation Plan, Draft Environmental Impact Report/Environmental Impact Statement, Appendix F (hereinafter "Salton Sea Accounting Model") at pp. 12, and 15 fn. 1.

³ National Audubon Society, Closing Argument / Legal Brief, at p. 30. A copy of Audubon's legal brief is posted at SWRCB's website:

http://www.waterrights.ca.gov/IID/IIDHearingData/LocalPublish/Auduon_Legal_Brief_-_Final.pdf, and is hereby incorporated by reference.

⁴ Findings at p. 3, Table 1 (describing total out-of-basin transfers over fifteen years of 1,000,000 acre-feet to SDCWA.)

The Salton Sea Accounting Model is scientifically flawed, because it relies on unfounded (and unnecessarily pessimistic) assumptions about future water and salt inflows to the Sea to paint an inaccurate, worst-case scenario of a Sea in terminal decline. As a result of its fundamental, methodological flaws, the Model cannot form the basis for the Department's findings, where Fish and Game Code section 2081.7, subdivision (c) requires the Department to use the "best available science."

IV. THE TERMS OF ANY FUTURE QSA OR IID/SDCWA TRANSFER AGREEMENT ARE UNCERTAIN

The Department's draft findings state that, under the terms of the QSA Revision Term Sheet, "IID will have the discretion to pick the conservation methodology that assures the achievement of Salton Sea salinity goals and water schedules consistent with State and Federal law, the QSA and related agreements."⁵ The draft findings then make an entirely unsupported leap to the conclusion that, "[a]ccordingly, IID would implement a program to conserve water for transfer to SDCWA in a manner that does not affect inflows to the Salton Sea that would otherwise take place."⁶

The Department's determination that inflows to the Sea will not be affected by the proposed IID/SDCWA Transfer Agreement are not supported by the evidence for at least the following reasons: 1) the QSA, in its present configuration, has been rejected by IID; 2) the QSA Revision Term Sheet is not binding on any party to the transfer until there is a QSA; and 3) IID has rejected the proposal to transfer water to SDCWA. Until a revised QSA and/or IID/SDCWA Transfer Agreement are drafted and approved, it cannot be known how much water will be transferred out-of-basin, or how the mechanics of such transfers will affect inflows to the Sea both in terms of water quantity and salinity loading.

In short, any attempt by the Department to make the findings required by section 2081.7, subdivision (c), are necessarily premature until 1) a transfer project is actually defined and accepted by IID and SDCWA, 2) the QSA and its Revision Term Sheet are actually signed and accepted by the participating parties, and 3) mitigation program(s) for the QSA and the transfer are sufficiently defined and described so that the Department has meaningful information on impacts to the Sea. At present, there are several inconsistencies between the QSA Term Sheet, the EIR for the Water Transfer Project, and the conditional terms of approval in SWRCB's Order. These inconsistencies, in conjunction with IID's rejection of the IID/SDCWA Transfer Agreement, make it fundamentally uncertain what the final QSA or IID/SDCWA Transfer Agreement, or their mitigation measures, will entail.

⁵ Findings, at p. 3.

⁶ Findings, at p. 3.

V. THE MINIMUM BASELINE INFLOW AND WATER QUALITY REQUIREMENTS FOR RESTORING THE SALTON SEA ARE UNKNOWN

Once the Department is able to 1) gather scientifically valid information on projected water and salt inflows to the Salton Sea without a QSA or an IID/SDCWA Transfer Agreement, and 2) review a revised QSA and Term Revision Sheet that has been fully accepted by the parties, it will then have precisely *one-half* of the information it needs to determine whether the first fifteen years of implementing the QSA will foreclose alternatives for reclamation of the Salton Sea under the Salton Sea Reclamation Act of 1998. The “other half” of the necessary information is the baseline needs of any such reclamation programs.

The Department’s draft findings presently contain no quantitative or qualitative information about available alternatives for reclamation of the Sea. Thus, even if the Department 1) had relied upon a scientifically defensible baseline study (rather than the Salton Sea Accounting Model’s “worst-case” scenario) and 2) could divine the requirements of a future, revised QSA and IID/SDCWA Transfer Agreement, with that information the Department would only be able to compare the QSA to a “no action” (i.e., no QSA / Transfer) alternative.

The Department cannot make a reasoned finding that the first fifteen years of a revised QSA or IID/SDCWA Transfer Agreement will not preclude reclamation alternatives under the Salton Sea Restoration Act of 1998 until it at least has some inkling of what those reclamation alternatives might be, and what ongoing conditions would be required at the Sea for their successful implementation. This is especially true under the likely situation where long-term reclamation alternatives for the Sea may require long-term supplies of replacement water, but the Water Board’s recent conditions in “approving” the rejected IID/SDCWA Transfer Agreement only require one-to-one replacement for a scant fifteen years. Even if the Water Board’s present conditions of approval are implemented by IID and SDCWA in some revised version of an as-yet-undefined long-term water transfer project, such a transfer project would certainly limit or preclude altogether any long-term restoration program that might otherwise require replacement water beyond year fifteen.

VI. THE DEPARTMENT’S ASSUMPTIONS REGARDING RECHARGE TO THE SEA FROM CVWD ARE UNSUPPORTED

Finally, the Department’s findings inappropriately assume that one-third of the water transferred to the Coachella Valley Water District (CVWD) will drain back to the Sea, leading to the conclusion that out of 240,000 acre-feet transferred, only 160,000 acre-feet will actually be lost to the Sea.

The Department’s assumption of return flows from CVWD to the Sea is unfounded. The Department’s finding is based on the assumption that the water transferred to CVWD will be used for surface irrigation, and then drain back to the sea. However, CVWD has stated that the water transferred from IID would be used to recharge groundwater to address overdraft. Thus, the Department’s estimates understate the water lost to the Sea by nearly 80,000 acre-feet over the fifteen-year period.

CONCLUSION

CDFG cannot issue any findings on the QSA's impacts on restoration of the Salton Sea under SB 482, because the Department's legal authority to issue such findings evaporated with IID's rejection of the proposed IID/SDCWA Transfer Agreement. In addition, the Department's proposed findings are not supported by substantial evidence. The proposed findings 1) rely on a scientifically invalid projection of the Sea's future condition, 2) are based on terms for a QSA and the IID/SDCWA Transfer Agreement that have not been accepted or ratified by the parties to those agreements, 3) contain absolutely no information about the baseline and ongoing requirements for restoration alternatives for the Sea, and 4) mistakenly assume that some portion of the water transferred to CVWD will drain back to the Sea.

On behalf of National Audubon Society, Inc., and under the circumstances presented, we respectfully request that the Department decline to issue its proposed findings regarding the defunct QSA's impacts on restoration alternatives for the Salton Sea.

Thank you,

[original signed]

Keith G. Wagner